

1786..  
6332, 36

C A S E  
OF THE  
Ship N I C H O L A S.

**I**N consequence of the battle of Lexington, the advice of which was brought to England in May 1775, it having been conceived, that the capturing of all American vessels laden with provisions, rum, live cattle, hay, salt, lumber, molasses, fuel, or any sort of naval stores, (whether in breach of any act of trade or not) for the use of the rebel states, might tend to put an end to the disturbances, the Lords of the Admiralty, during the prorogation of parliament, gave instructions, dated the 4th June 1775, to the commanders in chief of his majesty's fleet on the American station to issue copies of the following orders to the captains of the king's ships under their command, previous to the passing of the act of the 16th of his Majesty's reign:

By Samuel Graves, Esq. vice-admiral of the white, and commander in chief of his majesty's ships and vessels employed and to be employed in the river St. Laurence, &c. &c. &c.

You are hereby required and directed to observe and punctually obey the following orders and directions

A

tions during the present rebellion, or until you receive contrary orders from myself, or any other your superior officer, viz.

You are to seize and detain all ships and vessels belonging to the inhabitants of the four New-England provinces, and to send them to Boston, or to any other port in America where they may be safely kept until his majesty's pleasure is known concerning them; and you are, in all cases of seizure and detention as aforesaid, to transmit to me an account thereof, according to a form annexed, and to give strict directions to the officer put on board, to prevent embezzlement, and, upon his arrival at Boston, to report to me, or to the commanding officer at any other port, the condition of the vessel, and if any part of the cargo is in danger of perishing.

You are to do all that is in your power to prevent any commerce between the colonies of New-York, New-Jersey, Pennsylvania, Virginia, Maryland, and the Carolinas, and any other places than Great-Britain, Ireland, or his Majesty's islands in the West-Indies, including the Bermuda and Bahama islands; to search every vessel going into, and coming out of, the ports in these colonies, and to seize and detain them in every case in which you shall make any discovery of contraband trade, or conveyance of arms and ammunition, military or naval stores of any kind.

You are to receive on board and afford every reasonable accommodation to the governors, or other officers of the colonies within your respective stations, who may be compelled by the violences of the people to seek such an asylum; and generally  
to

to afford every protection in your power to any of his majesty's subjects who may require it: And further you are hereby required and directed to cause it to be publicly signified in all such seaport towns as are accessible to the king's ships, that, if any violences shall hereafter be offered to any of the officers of the crown, or other peaceably disposed subjects to his majesty, or if any bodies of men shall be raised and armed in the said towns, or any military works erected, otherwise than by order of his majesty, or those acting under his authority, or if any attempts shall be made to seize or destroy any public magazines of arms, ammunition, or other stores; it will be your duty to proceed, by the most vigorous efforts, against the said towns, as in open rebellion against the king: And if, after such signification, any town shall persist in the rebellious acts above stated, you are hereby required and directed to proceed accordingly; (it being his majesty's firm resolution that every measure be pursued for suppressing, by the most vigorous efforts by sea and land, this unnatural rebellion, which menaces the subversion of the present happy constitution.)

And whereas there is ground to suspect that many persons in England hold a traitorous correspondence with his majesty's rebellious subjects in North-America, you are hereby most strictly required and directed to stop and search all merchant ships and vessels bound to or from North-America, and carefully examine every letter on board; and all those that shall, in your opinion, contain any matter tending to aid, abet, or advise the rebellious proceedings of his majesty's subjects in North-America,



rica, to secure and send them to me, carefully sealed up, by the safest and quickest conveyance.

You are to observe the same conduct with respect to all letters containing intelligence of present or intended operations of the rebels, or any other information proper for me to be acquainted with.

You are to seize and send to Boston all ships and vessels belonging to any of the other colonies in North-America, laden with provisions, rum, live cattle, hay, salt, lumber, molasses, fuel, *or any sort of naval stores, whether they are in breach of any act of trade or not*; constantly transmitting to me accounts thereof, as before directed, upon seizing the ships and vessels belonging to the four New-England governments.

And whereas the rebels are striving to equip a naval force to intercept supplies coming to the army and fleet at Boston, and to oppose the small ships and vessels of his majesty's squadron, you are to take or destroy these pirates wherever they can be found, and all vessels, of whatever denomination, the property of rebels, in the harbours, or on the coast, of the four New-England governments; and also all those in the other colonies that are arming, or are evidently intended to be employed, in the rebellion against his majesty.

Whenever it can be done, you are to seize any of the delegates to the congress, the rebel general officers, or principal aiders and abettors of the rebellion, and keep them prisoners until you can safely deliver them to me; and you are to seize all vessels carrying emigrants from Great-Britain to the colonies,



Given under my hand, on board his majesty's  
ship Preston, at Boston, the                      day of  
1775.

SAMUEL GRAVES.

commander of his Ma-  
jesty's the

By command of the admiral,

G. GEFFERINA.

The above is an order which was issued by my predecessor, Vice-Admiral Graves, commander in chief of his majesty's ships and vessels in North-America, to the captains and commanders of those ships then under his command, of which the *Savage* sloop, then under the command of Captain Bromedge, was one; and which order was confirmed by me on my arrival there.—Received from Vice-Admiral Graves the 16th January, 1776.

SHULDHAM.

An



## C A S E.

IN the month of January 1776, Hugh Bromedge, Esq. commander of his Majesty's sloop of war *Savage*, by (virtue of instructions from admirals Graves and Shulldham, successively commanders in chief of his Majesty's ships on the American station, by which he was ordered among other things "to seize all ships "and vessels belonging to the revolted colonies, laden with provisions, rum, live "cattle, hay, salt, lumber, molasses, fuel, "or any sort of naval stores, whether they "were in breach of any act of trade or "not,") captured, in the road of Halifax, in Nova Scotia, two vessels, called the *Nicholas* and *Boston Packet*, the property of certain persons inhabitants of the revolted colonies of Massachusetts Bay, laden with sundry kinds of *naval stores*; which vessels were afterwards condemned as lawful prizes by the Vice Admiralty Court at Halifax under the statute 16th George III. c. 5. and by order of that court sold at public sale, by the vendue master, to the highest bidder; the net proceeds of the *Nicholas*, with her cargo, amounting to 4,408*l.* 3*s.* and the *Boston packet*, with her cargo, to 3,711*l.* 16*s.* 5*d.* as certified by the deputy registrar of the said Court of Vice Admiralty.

8th May,  
1775.

15th May,  
1776.

The



May, 1776.

The owners or claimants of these vessels having interposed appeals within fourteen days after sentence, the captor sometime afterwards, when the precise amount of the net proceeds of sale had been ascertained, gave bail in the usual manner, by entering into a recognizance, with sufficient sureties, for exactly double the said amount : which amount of net proceeds, by the uniform and invariable practice of the Court of Vice Admiralty, as appears by the certificate of the deputy judge, had always been considered, by the Court and by parties, as the true and full value intended to be secured by act of parliament.

6th August,  
1776.12th March,  
1780.

The said appeals having been heard before the Lords Commissioners, their Lordships were pleased to reverse the sentence of the Court below, and decreed the vessels and their cargoes to be restored, or the *value thereof* to be paid to the respective claimants.

15th March,  
1781.

Pursuant to this decree, restitution of the *Nicholas* was served upon the captor and his sureties by the claimants of that vessel ; and, some time afterwards, the sum of 4,408*l.* 3*s.* was paid into their Lordships registry, on behalf of the said captor and sureties, as the net proceeds of the said ship *Nicholas* and her cargo : but the said claimants having refused to accept of that sum as the *full value thereof*, their Lordships were pleased to refer

refer a certified copy of said account of sales, together with certain accounts or invoices produced by the said claimants to one of the Deputy Registrars, who reported that there was due to the claimants the sum of 7,708*l.* 17*s.* 3*d.*

20th July,  
1781.

Their Lordships' Surrogate having confirmed said report if no objection should be made thereto by the next sitting of their Lordships, at the petition of the proctors for the claimants, (the captor and all his sureties being then abroad, and no appearance made for them,) their Lordships were pleased to confirm the report, and decreed the usual monition for payment of 3,455*l.* 3*s.* 6*d.* to the said claimants, as the remainder of the value of ship and cargo according to the said report, with costs.

8th November,  
1781.

31st January,  
1782.

Thomas Boylston, one of the claimants of the Nicholas and cargo, received the sum of 4,253*l.* 13*s.* 9*d.* being part of the above sum of 4,408*l.* 3*s.* paid into the registry on behalf of the captor and his sureties, for which he gave a receipt in part, still reserving his claim to the balance of 3,455*l.* 3*s.* 6*d.* being the remainder of the sum of 7,708*l.* 17*s.* 3*d.* reported by the Registrar to be due to him.

9th March,  
1782.

A monition, and afterwards an attachment, having been decreed against the captor, upon affidavits that he was not to be found, monitions were decreed

23d April,  
1784.

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against

27th July,  
1785.

against the sureties, which, having been served upon them, their Lordships afterwards having heard informations by counsel on the part of the claimants and sureties, (no appearance being made for the captor,) were pleased to decree the said sureties to pay the claimant, Thomas Boylston, the aforesaid sum of 3,455*l.* 3*s.* 6*d.* as the remainder of the value of the ship Nicholas and cargo, according to the Registrar's report, thirty days after service.

The claimants of the Boston packet have taken no steps since the 25th April 1783, at least the sureties have no notice of any; but it is to be presumed they will proceed as soon as they shall be informed of the decree in the case of the Nicholas. Your advice and directions are therefore requested on the part of the sureties;

Query 1st. Whether they ought to acquiesce in regard to the Boston Packet, on the authority of the decree in the case of the *Nicholas*?

2d. If, notwithstanding such decree, however, you should be of opinion, from the construction of the statute of 16 Geo. III. c. 5, that the words, *or the full value thereof*, (p. 224,) mean only in the intendment of the legislature the *net proceeds of public sale*, and not any indefinite sum which might be estimated from the invoices, or the accounts of the claimants; and



and that it may therefore be advisable to try the question once more—Is there any and what mode of suspending the payment of the above sum of 3,455*l.* 3*s.* 6*d.* to the claimants of the *Nicholas*, till the event of their Lordships determination, in regard to the *Boston Packet*, might be known?

Mr. RICHARDSON's Opinion.

Having considered the case annexed, with the papers referred to, I think it advisable in respect to the ship *Boston Packet*, to try the question once more, as I conceive, from the construction of the prize acts, that Captain Bromedge and his sureties are only answerable to the claimants for the *clear amount* or *net proceeds of the public sale*, and for no more.

The chief difficulty in 16th Geo. III. 1st. Point.  
c. 5, as far as it regards the point in question, seems to hang upon the words *or the full value thereof*, in the following proviso.

P. 224

“ Provided always, and it is hereby further enacted by the authority aforesaid, that the execution of any sentence, so appealed from as aforesaid, shall not be suspended by reason of such appeal, in case the party or parties appellate shall give sufficient security, to be approved of by the court in which such sentence shall be given, to restore the ship, vessel, goods, or effects,

B 2

“ concerning

“ concerning which such sentence shall  
 “ be pronounced, *or the full value thereof,*  
 “ to the appellant or appellants, in case  
 “ the sentence so appealed from shall be  
 “ reversed.”

These words taken alone, without reference to any other part of the act, are certainly indefinite, as they may either imply the value *as produced by public sale or appraisement*, or the value *according to the invoices or accounts of claimants*. It becomes necessary, therefore, to resort to the established rule of construing general expressions in statutes, by considering how far clauses in the same or similar acts may remove the doubt, and lead to the true intention of the legislature.

16 Geo. III.  
 c. 5.

As the great object of this statute was to prevent all aid, supply, and assistance, being sent to the revolted colonies, and to encourage the officers and seamen of the royal navy to be vigilant and active in carrying this object into execution, such construction ought, I think, to be adopted as might best tend to suppress the mischief, and encourage and protect those whose duty it more especially was to act under the compulsive authority of the statute. To distress, therefore, or perhaps involve in eventual ruin, on points of nice distinction, men against whom no imputation might lie, but that of having obeyed the laws and the orders of their superiors, cannot be presumed to have

have been the intention of parliament. On the contrary, as that which is implied by an act is held to be equal to express words in that act, I conceive the opposite intention is clearly to be inferred from other parts of the statute, where provision is made for contingencies, by no means so favourable as the circumstances of the present case.

In the clause which directs judges of the Courts of Admiralty how to proceed in the condemnation of prizes, it is enacted,  
 “ That if, upon the said preparatory ex-  
 “ aminations, it shall appear doubtful to  
 “ the judge or judges of such Court of  
 “ Admiralty whether such capture be  
 “ lawful prize or not, and it shall ap-  
 “ pear necessary, according to the cir-  
 “ cumstances of the case, for the clearing  
 “ and determination of such doubt, to  
 “ have an examination upon pleadings  
 “ given in by the parties, and admitted  
 “ by the judge, of witnesses that are re-  
 “ mote from such Court of Admiralty,  
 “ and such examination shall be desired,  
 “ and that it be still insisted on, on be-  
 “ half of the captors, that the said cap-  
 “ ture is lawful prize, and the contrary  
 “ be still persisted in on the claimants be-  
 “ half, that then the said judge or judges  
 “ shall forthwith *cause such capture to be*  
 “ *appraised* by persons to be named by  
 “ the parties, and appointed by the  
 “ Court, and sworn truly to appraise the  
 “ same according to the best of their  
 “ skill

P. 220.



“ skill and knowledge, for which pur-  
 “ pose the said judge or judges shall cause  
 “ the goods found on board to be un-  
 “ laden, and an inventory thereof being  
 “ first taken by the Marshal of the Ad-  
 “ miralty, or his deputy, shall cause all  
 “ such parts of the goods and merchan-  
 “ dise, as are perishable commodities, to  
 “ be sold by public sale, *for the clear*  
 “ *amount of which only the captors shall*  
 “ *be answerable to the claimants*, and the  
 “ remainder of them to be put unto pro-  
 “ per warehouses, with separate locks  
 “ of the collector and comptroller of the  
 “ customs, and where there is no comp-  
 “ troller, of the naval officer, and the  
 “ agents or persons employed by the cap-  
 “ tors and claimants, at the charge of  
 “ the party or parties desiring the same ;  
 “ and shall, after such appraisement made,  
 “ and within the space of fourteen days  
 “ after the making of such claim, proceed  
 “ to take good and sufficient security  
 “ from the claimants to pay the *captors*  
 “ *the full value thereof according to such*  
 “ *appraisement*, in case the same shall be  
 “ adjudged lawful prize ; and shall also  
 “ proceed to take good and sufficient  
 “ security from the captors to pay such  
 “ costs as the Court shall think proper, in  
 “ case such ship shall not be condemned  
 “ as lawful prize : and after such securities  
 “ duly given, the said judge or judges  
 “ shall make an interlocutory order for  
 “ releasing or delivering the same to such  
 “ claimant or claimants, or his or their  
 agents,

“ agents, and the same shall be actually  
 “ released or delivered accordingly.

“ And it is hereby further enacted, by  
 “ the authority aforesaid, that if any claim-  
 “ ant or claimants shall refuse to give  
 “ such security, the judge or judges  
 “ shall cause the captor or captors, in  
 “ like manner, to give good and sufficient  
 “ security to pay the said claimant or  
 “ claimants *the full value thereof accord-*  
 “ *ing to the appraisement*, in case any such  
 “ capture or captures shall be adjudged  
 “ not to be lawful prize, and the said  
 “ judge or judges shall thereupon proceed  
 “ to make an interlocutory order for the  
 “ releasing and delivering the same to  
 “ the said captor or captors or their  
 “ agents.”

While the question of *prize or no prize* then hangs in suspense, it appears evident from these clauses that the captor or claimant, which ever of them gives the security and gets possession of the ship and cargo, is answerable to the other party (according to the event of suit) *for the full value according to the appraisement*, or for the *clear amount of the public sale*, (where any sale is made,) and for no more. If the meaning of the legislature, therefore, in regard to the words *or the full value thereof*, seems to be so clear in these clauses, which provide for *doubtful captures previous to condemnation or release*, such interpretation ought I presume

presume more forcibly to apply to *captures which have been actually condemned and afterwards discharged upon appeal*: as (to use the words of Lord Mansfield, and of the late Attorney General Wallace),

Sullivan and  
Montague,  
Doug. 104-5. “ It would be extraordinary indeed if a  
“ person who had taken a ship which  
“ had never been condemned might be  
“ protected, and yet that another, who had  
“ such good ground for seizure as to ob-  
“ tain a sentence in his favour, should  
“ have no such protection if that sentence  
“ was afterwards reversed, but were to  
“ be in a worse situation than if that sen-  
“ tence had been against him.”

As all acts *in pari materia* are at the same time to be taken together, in order to explain obscure or doubtful words in any particular statute, I conceive that the prize act of 32 Geo. II. c. 25, gives considerable weight to the construction now contended for; as the strongest presumption seems to arise from a clause in that act, that it never could be the intention of parliament to make a captor, in the event of reversal, upon an appeal, chargeable for more than the net proceeds of public sale, or the value by appraisement.

Sect. 24. “ In case any appeal be interposed from  
“ a sentence in any Admiralty Court con-  
“ cerning any goods taken as prize, in  
“ pursuance of the 29th Geo. II. c. 3, 4, or  
“ of this act, the judge of such Court of  
“ Admiralty shall, at the request and  
“ charges



“ charges either of the captor or claimant,  
 “ make an order *to have such capture ap-*  
 “ *praised* (unless the parties otherwise  
 “ agree upon the value) and an inventory  
 “ taken, *and then take security for the*  
 “ *value*, and thereupon cause such cap-  
 “ ture to be delivered to the party giving  
 “ such security, *as by the former act such*  
 “ *judge could have done before sentence*  
 “ *given. And if there shall be any objection*  
 “ *to the giving or taking security*, the said  
 “ judge shall, at the request of either of  
 “ the parties, order such goods to be en-  
 “ tered, landed, and sold by public auc-  
 “ tion, as prize goods now are, under the  
 “ care of the proper officers of the cus-  
 “ toms, and under the direction of such  
 “ persons as be appointed by the claimants  
 “ and captors; *and the monies arising by*  
 “ *such sale shall be deposited in the bank of*  
 “ *England*, or some public securities, and  
 “ in the names of such trustees as the  
 “ captors and claimants jointly appoint,  
 “ and the court shall approve *for the use*  
 “ *of the parties entitled thereto.*”

Here a provision is made *in the case of*  
*an appeal* similar to that which is enacted  
 in the above recited clauses of the 16th  
 Geo. III. in regard to captures *previous*  
*to condemnation or release*. An *appraise-*  
*ment* is in the first place ordered, *and*  
*security required for the value, as settled*  
*by such appraisement*. But it afterwards  
 goes farther towards ascertaining the in-  
 tention of parliament; it being enacted that

C

if

if any objection is made touching security, the goods shall then be *sold by public sale*, and the *monies arising from such sale deposited in the bank, or some public security, for the use of the parties entitled thereto.*

Now here the bank or other public security is considered merely in the nature of a stakeholder; and, whether such stakeholder might be the bank, or the prize agent, must be altogether immaterial as far as it respects the *quantum* to be eventually paid, or the merits of the case. The intention of parliament appears manifest, that whether it might be the captor or the claimant in whose favour the appeal should be determined, the successful party had a right to the deposit and to the deposit only. So, had there been any objection in the present case to the giving or taking security, the monies arising by the sale must have been somewhere deposited, by order of Court, in the manner directed by that clause; and the captor in that event could not, I presume, have been liable for one shilling beyond the sum so deposited. But no such objection having been made, and the clear amount of the public sale having been lodged, agreeable to common usage, in the hands of the prize agent, (a public officer of whom the statute takes notice), and by him paid over to the claimants pursuant to the decree of reversal, I confess I cannot discover upon what principle the captor, under such circumstances, can be held accountable

18th March,  
1780.

countable for more than if the same had been deposited in the bank of England. Nor indeed is it easy to conceive with what view parliament has been so careful in every prize act to introduce clauses in regard to *appraisement* and *public sale*, excepting for the single purpose of *ascertaining precisely* what the captors should receive in case the capture should definitely be adjudged a prize, or the claimants recover in case she should be discharged; whilst not a syllable being to be found in any of the prize acts, in regard to estimating in *any case whatsoever* the *value of a prize by the invoices of claimants*, or the *assessments of Registrars of the Admiralty*, seems in my opinion to be a strong additional demonstration that such indefinite estimates never were in the contemplation of the legislature; but that in every case where the question of *prize or no prize* could not be immediately decided, *public sale* or *appraisement* were to be the only measures by which the value of the capture was to be determined.

Whilst the construction at the same time, for which the claimants contend, appears to be altogether inconsistent with the intention of parliament, it seems to be equally repugnant to the general principles of equity, reason, and public convenience; as it tends to distress men for merely doing that which the law compels them to do. What has been the conduct of Captain Bromedge in the case before



us? He seized the two ships in question by the express orders of his commander in chief, issued previous to the arrival of the act in America, which orders, by the articles of war, he could not disobey. They were immediately in the usual course put under the care of the proper officers, subject to the directions of the Court of Vice Admiralty at Halifax, to whose forms and practice he was also bound by law to conform himself. They were duly condemned by that Court: they were then sold to the highest bidder by the public vendue-master: but the recognizances, by the consent of both parties, and in conformity to the practice of the Court, were not executed till some months after; when *the clear amount of the sales* being made up, and the money deposited in the hands of the prize agent, as stakeholder, to abide the event of the appeal, Captain Bromedge then entered into recognizances with sufficient sureties for *exactly double such clear amount*, to respond judgment, agreeable to the uniform rule prescribed by the Court of Vice Admiralty, as certified by the judge thereof. Such being the case, therefore, as Captain Bromedge in every stage of the business appears to have acted strictly according to the laws of his country, the orders of his superiors, and the practice of the Court of Admiralty, I with great difference conceive that no construction by implication, nothing but the most express and positive words in the statute, could authorise an inter-

interpretation so unjust and oppressive, as might tend eventually to ruin an officer for doing that which not only he had no power to question, but must have subjected himself to be cashiered, perhaps shot, had he presumed to have refused, or even hesitated to obey.

Another circumstance of injustice seems also to arise from subjecting a captor, in the event of a reversal upon appeal, to pay more than the clear amount of the public sale or appraisement. The value of a commodity is not intrinsic—it depends upon various accidents, and particularly upon the demand. The market price where it is sold seems therefore to be the best measure of the value, as between the captor and the claimant, and not the invoices, which are not only open to fraud, but liable to many variations from the nature of the bargain, and the credit of the buyer. Articles at the same time which might sell at a high rate, where they are scarce, may sell very low where they are in abundance. But a captain of a man of war is not like a merchant: however much it may be for his advantage that his prize should sell to good account, he cannot hunt about for a market—he is bound to attend to his orders, and to his superior line of duty—he must carry his prize to the first port, or to his port of destination, where there may be little or no demand for the cargo: yet, upon condemnation, there it must in  
general

general be sold should the market price be 50 *per cent.* or more under the invoice. If, in case of a reversal, therefore, upon a nice point, of which neither he nor even a Court of Admiralty could form a correct opinion, he is to be held chargeable for any indefinite sum above the clear amount, he seems not only thereby compelled to insure a market for the claimant, which is absurd, but, as in the present case, although Captain Bromedge would only have been entitled to two-eighths, or about 1,100*l.* had the ship *Nicholas* been adjudged lawful prize, yet, under the decree, as it now stands, he or his sureties are subjected to pay the whole of the surplus sum of 3,455*l.* 3*s.* 6*d.* assessed by the Registrar, over and above the net proceeds, and exclusive of costs. For where is the captain now to find his officers and his men at the distance of ten years from the capture, scattered, as the survivors must be, all over the world ; and even if they could be found, how shall he compel those to contribute who seldom are possessed of any property at all ?

27th of July,  
~~1775~~  
 1785

Whilst there appears therefore to be an absolute failure of justice under this construction, another evident public inconvenience seems unavoidably to flow from it, that few men in their senses who had any property to lose would, in any future war, stand forth as bail in matters of appeal. For although a man, to serve his friend, might be ready to run the risk of  
 a certain



a certain definite sum, he cannot be expected to subject himself to damages which may extend to every shilling of his fortune.

I am therefore of opinion, upon the grounds of substantial justice and public convenience, as well as upon what I conceive to be the equitable construction of the prize statutes, that the words *or the full value thereof* mean the *full value or clear amount of the public sale, or previous appraisement*, and no more.

Whilst I think, however, that Captain Bromedge and his sureties should not on these grounds acquiesce in regard to the Boston Packet, on the authority of the precedent in the case of the Nicholas, I confess I know of no mode of suspending payment of the sum of 3,455*l.* 3*s.* 6*d.* decreed to be paid by the sureties, over and above the net proceeds formerly paid into Court, unless, upon a proper application to the Lords of Appeals, their Lordships might be induced to review their decree, and in the mean time to stay execution. Should their Lordships however resist such application, the captor and his sureties are so far, I presume, without remedy, their Lordships definitive sentence being final. ad. point.

JOHN RICHARDSON,  
Inner-Temple, 28th October, ~~1775~~ 1785

## OPINION of the ATTORNEY-GENERAL.

To Query 1st. The decision in the case of the Nicholas is so very severe an one, that I cannot advise the persons concerned in the Boston Packet to give up their claim, though I can give them very little hopes of success, as the cases seem to me to be exactly the same. The misfortune of these cases is, that provision ought to have been made for restitution according to the appraised value at the time the sentence was reversed.

For I do not suppose the Lords meant, in a case circumstanced like the present, to declare that the captors ought to pay by any other rule than the account of the sales; for the consequence of such a determination would be fatal to the officers of the navy, and make it totally impossible for them ever to get sureties. I do not say there may not be cases in which the judge would do right in decreeing the full value; but this does not appear to me, with great submission to the Lords of Appeal, to be a case of that sort; and I therefore conceive that their Lordships went upon the former decree, and the confirmation of the report of the register.

As there has been no instance of a commission of review within this century, I cannot advise the attempt now, and  
know

I am afraid the poor captor is without remedy; and as to the fureties their only remedy is against him.

Nov. 2d, 1785.

I have perused Mr. Richardson's opinion, in which he has very elaborately considered the several acts of parliament that relate to this point, and I concur with him in opinion as to the meaning of the words *or full value thereof* in 16th Geo. III. c. 5.

R. P. A.

To the KING's Most excellent  
MAJESTY,

*The humble Petition of Henry Newton and Alexander Brymer of Nova Scotia, and Alexander Thomson, late of Nova Scotia, but now of London,*

SHEWETH,

D

That in the month of January, in the year of our Lord 1776, Hugh Bromedge, Esq. commander of your Majesty's sloop of war the Savage, by virtue of instructions from Admiral Graves, com-

mander



Jan. 1776.      mander in chief of your Majesty's ships upon the American station, ordering him among other things " To seize all ships " and vessels belonging to the revolted " colonies laden with provisions, rum, " live cattle, hay, salt, lumber, fuel, or " any sort of *naval stores*, whether they " *were in breach of any act of trade or* " *not,*" captured in the harbour of Halifax, in Nova Scotia, two vessels, called the Nicholas and Boston Packet, the property of certain persons inhabitants of the revolted colony of Massachusetts Bay, laden with sundry kinds of *naval stores*; which captures Sir William Howe, then commander in chief of your Majesty's troops in America, highly approved of in his letter dated the 16th of February, 1776, to Lord Shulldham, who had succeeded Admiral Graves as commander in chief of your Majesty's ships in those seas, of which the Savage sloop was one.

8th May, 1776.      That the usual proceedings were instituted against the said ships and cargoes in the Vice Admiralty Court at Halifax, under the statute of the 16th year of your Majesty's reign, c. 5, and the same were condemned as good and lawful prize to the captors.

15th May, 1776.      That the said ships the Nicholas and Boston Packet with their respective cargoes were by order of the Court of Vice Admiralty aforesaid, sold at public sale by the vendue-master to the highest bidder :  
the

the net proceeds of the Nicholas and her cargo amounting to 4,408*l.* 3*s.* and the Boston Packet and her cargo to 3,711*l.* 16*s.* 5*d.*

That the owners of the said ships and their cargoes having within fourteen days after the sentence of condemnation interposed an appeal, the said Hugh Bromedge, the captor, being obliged by the aforesaid statute to give security to answer the said appeal, your petitioners, as soon as the sales of the said ships and cargoes were completed, and the accounts of the *net proceeds were settled*, did jointly and severally enter into a recognizance in the usual manner, whereby they became bound in a sum exactly *double* the amount of the said net proceeds, that the captor should restore the said ships and their cargoes, *or the value thereof*, to the claimants, in case the sentence appealed from should be reversed.

6th August,  
1776.

That the amount of the net proceeds by the uniform practice of the said Court of Vice Admiralty had always, as appears by a *certificate under the hand of the Deputy Judge of the said Court*, been considered by the Court and by the parties as the true and full value intended to be secured by the act of parliament aforesaid.

That the said appeals having been heard before the Lords Commissioners for Prize Causes, their Lordships on or about the 18th day of March, in the year of our

18th March,

Lord 1780, were pleased to reverse the sentences of the Court below, and decreed the said vessels and their cargoes to be restored, *or the value thereof* to be paid, to the respective claimants.

21st April,  
1780.

That pursuant to the said decree, the instrument of restitution of the said ship Nicholas and her cargo was served upon the said Hugh Bromedge the captor, and also upon your petitioners as sureties in the recognizance aforesaid; and *William Brymer*, of London, Merchant, on behalf of the said captor and your petitioners, did accordingly bring into the Registry of the said Court of Appeals the sum of 4,408*l.* 3*s.* being the net proceeds of the sale of the said ship Nicholas and her cargo as aforesaid.

28th July,  
1780.

15th March,  
1781.

7th November,  
1781.

That a copy of the minute upon bringing the said sum into the Registry as aforesaid having been transmitted to the Vice Admiralty Court at Halifax, the Deputy Judge of the said Court did, in consequence thereof, *direct the recognizance aforesaid to be cancelled*, deeming the condition thereof to have been thereby fully complied with.

27th March,  
1781.

29th March,  
1781.

That the appellant's proctor having refused to accept the aforesaid sum, brought in, as above mentioned, as the full value of the said ship and cargo, exhibited an attestation of Thomas Boylston and John White, two of the claimants, with accounts annexed, or invoices, and prayed restitution



restitution of 12,701*l.* 4*s.* 8*d.* as the value of the said ship Nicholas and her cargo, and that these accounts might be referred to the Registrar of the said Court.

That the said captor's proctor having objected thereto, and brought in an authentic copy of the account of sales of the said ship and cargo, their Lordships referred the said account of sales, together with the afore-said accounts brought in by the claimants' proctor, to one of the Deputy Registrars taking to his assistance merchants, and assigning them to report thereon.

20th July,  
1781.

That the said Deputy Registrar having accordingly taken to his assistance two merchants, reported that there was due to the claimants, owners of the said ship Nicholas and her cargo, the sum of 7,708*l.* 17*s.* 3*d.* which report their Lordships, at the petition of the proctor for the said claimants confirmed; and also, at his petition, decreed a monition for payment of the difference between the sum reported by the Registrar, and the amount of the net proceeds of the said ship and cargo brought into the Registry as aforesaid.

8th November,  
1781.

That monitions having accordingly issued against Hugh Bromedge, the captor aforesaid, the same were returned without having been served upon him, by reason, as was suggested, that he could no where be found. Upon which, at the petition of the said claimants' proctor, their Lordships

18th April,  
1782.

16th July,  
1784.

ships decreed a monition against your petitioners as sureties for the said Hugh Bromedge, to shew cause why they should not be condemned to pay the sum of 3,455 *l.* 3 *s.* 6*d.* as the difference between the amount of the sum reported by the Registrar and the net proceeds as aforesaid.

That the said monition having been personally served on your petitioners was returned into Court, and a further monition prayed against your petitioners to shew cause why they should not be attached.

27th July,  
1785.

That an appearance being given for your petitioners, (before which time they could not except to the Registrar's report, not being parties to the cause nor liable in any shape but in default of the captor,) it was objected on their behalf that no further monition should be decreed against them, because every thing on their part having, as they conceived, been complied with, they became of course discharged from their recognizance: but their Lordships of this date were pleased to overrule the objection, and to decree your petitioners to pay to the claimant, Thomas Boylston, the aforesaid sum of 3,455 *l.* 3 *s.* 6*d.* as the remainder of the value of the said ship Nicholas and her cargo, according to the Registrar's report, thirty days after service.

27th July,  
1785.

That

That the said Hugh Bromedge having been under the necessity of going into foreign parts, as your petitioners have been informed and believe, in order to avoid being attached and imprisoned on account of the said sum of 3,455*l.* 3*s.* 6*d.* which he is unable in any manner to discharge; the payment of this large sum, together with the further sum of 3,512*l.* 0*s.* 2*d.* reported by the said Deputy Registrar to be due to the owners of the Boston Packet, taken as aforesaid at the same time and under the same circumstances, and which awaits the event of the present question, must fall wholly on your said petitioners.

That your petitioners are informed that this is the *first* case where the Lords of Appeals have decreed upon an attachment against *Sureties* under such circumstances; which, if allowed to stand as a precedent, must prove of great public inconvenience, as tending to deter men of property from becoming sureties hereafter in any case of capture: and as there are circumstances of peculiar hardship in the whole of this case, as well on the part of your petitioners, who are altogether blameless, (they having conformed in every point to the uniform practice and course of your Majesty's said Court of Vice Admiralty,) as on the part of the said Hugh Bromedge, now in a state of exile, in consequence of having acted in strict obedience to the express orders of his commander in chief, which  
 orders



orders he could neither question nor disobey;

YOUR petitioners most humbly pray that as this case of *Sureties* is *materially distinguishable* from all preceding cases where *captors* or *claimants* have alone been interested, your Majesty may be graciously pleased to grant a *commission of review* of the aforesaid decree of the 27th of July in the year of our Lord 1785, your petitioners being advised by council, learned in the law, that, should your Majesty be graciously pleased to grant such commission, they shall be able to assign good and sufficient reasons why your petitioners are not liable, under the aforesaid act of the 16th of your Majesty's reign, to pay more than the net proceeds by the accounts of sales, which, as aforesaid, they have already brought into the Registry of the said Court of Appeals.

And your petitioners shall ever pray, &c.

WM. BRYMER,  
Agent for the petitioners.

REPORT

REPORT of his Majesty's Advocate-General, Attorney-General, and Solicitor-General, to whom the above petition was referred.

My LORD,

IN humble obedience to his Majesty's commands, signified to us by your Lordship's letter of the inclosing a petition from Henry Newton, Alexander Brymer, and Alexander Thomson, of Nova Scotia, setting forth that, in the year 1776, Hugh Bromedge, Esq. commander of his Majesty's sloop of war the Savage, by virtue of instructions from the commander in chief of his Majesty's ships on the American station, had captured, in the harbour of Halifax, two vessels, called the Nicholas and Boston Packet, the property of certain persons, inhabitants of the revolted colonies of Massachusetts Bay, laden with naval stores; and that the said ships, with their respective cargoes, having been condemned as lawful prize by the Vice Admiralty Court at Halifax, were sold by order of the said Vice Admiralty Court, at public sale, by the vendue-master; the net proceeds of the Nicholas and her cargo amounting to 4,408*l.* 3*s.* and that of the Boston Packet and her cargo to 3,711*l.* 16*s.* 5*d.* and further setting forth, that an appeal having been interposed, whereby the captor became obliged

to give security to answer the said appeal, the petitioners did jointly and severally enter into recognizances, in double the amount of the net proceeds, that the captor should restore the said ships and their cargoes, or the value thereof, to the claimants, in case the sentence should be reversed; and that the said sentence of condemnation was reversed by the decree of the Lords Commissioners of Prizes, on or about the 18th day of March, 1780; and the said vessels and cargoes, or the value thereof, were ordered to be restored to the claimants: and further setting forth, that, upon service of the instrument of restitution upon Hugh Bromedge, Esq. and the petitioners, 4,408*l.* 3*s.* the net proceeds of the ship Nicholas and her cargo, were brought into the Registry of the said Court of Appeals, and that upon receipt of the *copy of the minute of such payment* to the Registrar, the recognizances so entered into by the petitioners were cancelled in Halifax by the judge of the Vice Admiralty Court, but that the appellants' proctor refused the said sum, and demanded 12,701*l.* 4*s.* 8*d.* as the value of the said ship and cargo: and also setting forth, that, upon the captor's proctor resisting any demand beyond the extent of the accounts of sales, the Lords Commissioners of Prizes referred the accounts of sales, together with claimants' accounts, to one of the Deputy Registrar's, taking to his assistance merchants, and assigning them to report thereon, who accordingly reported



ported that 7,708*l.* 17*s.* 3*d.* were due to the claimants of the Nicholas and her cargo, which report was confirmed by their Lordships: and also setting forth, that, in consequence of such confirmation, monitions were issued against Hugh Bromedge, Esq. who was not to be found, and therefore, on the petition of the claimants' proctor, monitions were issued against the petitioners as sureties for the said Hugh Bromedge, to shew cause why they should not pay to the owners the sum of 3,455*l.* 3*s.* 6*d.* the difference between the sum reported due, and the net proceeds of the sales of the Nicholas and her cargo, and that upon the personal service and return of the said monition, a further monition was prayed against the petitioners, to shew cause why they should not be attached; and that the petitioners appeared and objected to any further monition, contending that every thing on their parts had been complied with; which objection was overruled by the Lords Commissioners of Prizes, on the 27th July, 1785, and the petitioners decreed to pay to the claimants the sum of 3,455*l.* 3*s.* 6*d.* and praying,

“ Your petitioners most humbly pray  
 “ that as this case of *sureties* is *materially distinguishable* from all preceding cases where *captors* or *claimants* have alone been interested,  
 “ your Majesty may be graciously  
 “ pleased to grant a *commission of review* of the aforesaid decree of the

“ 27th of July, in the year of our  
 “ Lord, 1785, your petitioners be-  
 “ ing advised by counsel learned in  
 “ the law, that, should your Majesty  
 “ be graciously pleased to grant such  
 “ commission, they shall be able to  
 “ assign good and sufficient reasons  
 “ why your petitioners are not lia-  
 “ ble, under the aforesaid act of  
 “ the 16th of your Majesty’s reign,  
 “ to pay more than the net proceeds  
 “ by the accounts of sales, which, as  
 “ aforesaid, they have already brought  
 “ into the Registry of the said Court  
 “ of Appeals.”

38- We humbly certify that we have taken  
 the same into our consideration, and that  
 it appears to us that although the decree  
 of the 27th July, 1785, complained of in  
 the said petition, is attended with great  
 hardship to the petitioners, yet that it pro-  
 ceeded on particular circumstances which  
 arose in the course of the cause, and not on  
 any general principle which establishes  
 that sureties, circumstanced as the peti-  
 tioners are, must in all cases be responsible  
 for more than the amount of the net pro-  
 ceeds of a captured vessel and her cargo,  
 upon a sale by order of a Court of Vice  
 Admiralty: and we further certify that,  
 upon a former occasion, it was reported  
 to us by Mr. Swabey, one of the Deputy  
 Registrars of the Court of Admiralty and  
 Court of Appeals, that, after a diligent  
 search of the act books in the Registry of  
 the

the High Court of Appeals from the year 1689, (which is as far back as the books are preserved) only one instance has been discovered of a commission to review a cause once determined by the Lords Commissioners of Appeals in Prize Causes, viz. that of the *Hercules* in 1692: but we humbly conceive that it would be presumption in us to offer any opinion to his Majesty, respecting the propriety of granting commissions to review the decrees of the Lords Commissioners of Appeals in Prize Causes, apprehending that petitions for that purpose ought properly to be preferred to his Majesty in Council, and proceeded upon in like manner as petitions praying a commission to review the sentences of Courts of Delegates in Admiralty and Ecclesiastical Causes.

All which is submitted to his Majesty's royal wisdom.

4th March, 1786.

WM. WYNNE.

R. P. ARDEN.

A. MACDONALD.

To the Right Honourable Lord Sydney,  
one of his Majesty's  
Principal Secretaries  
of State.

In consequence of the above report, a petition of the same tenor with that before recited, with the following prayer, was accordingly presented to his Majesty in Council.

YOUR



YOUR petitioners therefore most humbly pray, as this is not only deeply interesting to the parties concerned, but involves in it consequences of the greatest importance to your Majesty's navy, that, before it be finally established as a precedent, the question may be fully argued and considered before your Majesty in council; your petitioners being advised, by counsel learned in the law that they shall be able to assign good and sufficient reasons why the aforesaid decree of the Lords Commissioners of Appeals should be set aside; as being contrary to the legal construction of the prize statutes, and unsupported by any principle of equity or law.

27th July,  
1785.

It having been surmised that the sureties were precluded from disputing the Registrar's report, because it had not been opposed on the part of the captor (then it is believed abroad) before it was confirmed, the following observations were delivered to the Clerk of the Privy Council, to whom the above petition to his Majesty had been officially transmitted from Lord Sydney's office.

#### SHIP NICHOLAS.

36 If it should be contended that, "because  
" the Registrar's report had not been op-  
" posed on the part of the captor, previous  
" to the confirmation of that report by the  
" Lords

“ Lords Commissioners of Appeal, any opposition after that time came too late, and therefore ought not to be admitted :” the sureties conceive that, although this might have been a bar as to the captor himself, yet it ought to be no bar in regard to them: because at the date of the confirmation they were strangers to the suit, and of course could not oppose the report in that stage. And this will appear from a short state of facts.

The Lords Commissioners reversed the sentence of the court of Vice Admiralty on the 18th of March 1780, and decreed ship and cargo to be restored, *or the value thereof.*

A writ of restitution having been accordingly served on the captor and his sureties, they paid into Court on the 15th of March, 1781, the sum of 4,408*l.* 3*s.* which being the amount of the net proceeds of the accounts sales, they then conceived, and still conceive, to be the *full value* of the ship and cargo, according to the true construction of the prize statutes.

The appellants, however, having refused to accept of the above sum in full, certain invoices and accounts of the ship and cargo were referred to one of the Deputy Registrars of the court of Admiralty, who reported the sum of 7,708*l.* 17*s.* 3*d.* to be due by the captor to the owners; which report was confirmed by the Surrogate on  
the

the 8th of November, 1781, and afterwards confirmed by their Lordships on the 31st of January, 1782.

1784.

Appellants  
farther case.  
1785, p. 1.

The usual monitions and attachment having been sued out against the captor for payment of the balance of 3,455*l.* 3*s.* 6*d.* on the 24th of April, and not before, upon affidavit that he was no where to be found, the appellants moved for a monition against the captor's sureties : which motion came on to be argued before their Lordships on the 16th July, 1784, when not being opposed by any person on behalf of the captor, and no *appearance being given for the bail*, their Lordships declined making an absolute order for fixing the bail, *without previously citing them to shew cause*; which monition *to shew cause* was accordingly issued of that date, and served upon one of the sureties on the 31st day of that month; at which time, *and not before*, the sureties became parties to the suit; those only being parties against whom process is prayed; and no process whatsoever, excepting the *writ of restitution*, having been till then prayed or sued out against them; which *writ of restitution*, as they are advised, they have fully obeyed and satisfied.

Sureties are not in all points bound by the act or neglect of their principal; for, if aggrieved, they may have a several and independent measure of relief. They are in



in no case parties to the original action brought against the principal only, till it shall appear that he has not satisfied the judgment, and it is not till a *capias* has been sued against him, and returned, that a *scire facias* can issue against the bail; and, of course, before that time, they are not in Court to any purpose of making a defence. So, if judgment go against the principal, and afterwards there be also judgment against the bail, the principal cannot have a writ of error on the judgment against the bail, nor the bail on the judgment against the principal; neither can they join in a writ of error.

The sureties, therefore, in the present case ought not to be precluded from making their separate defence, on account of any act or neglect of their principal; more especially as the Lords Commissioners have holden that they were not bound in any specific sum, but liable for uncertain damages; and as they apprehend that those damages have been assessed by the Registrar upon some principle not warranted by law, they contend that they have a right to be heard against such assessment, and ought not to be estopped by the confirmation of the report, *no appearance having been given to them* previous to the date thereof, which could admit them in any shape to oppose it. And the sureties think themselves more particularly au-

F
thorized

thorized to claim a hearing, as the monition itself expressly bears that an *appearance be given to them to shew cause* against the payment of the sum in question; which clearly demonstrates that their Lordships did not then conceive them to have been precluded by any antecedent laches of their principal.

15th June, 1786.

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The appellants in this cause, having on the 18th of May, 1786, moved the Lord's Commissioners of Appeals for Prize Causes, that process of attachment should issue against the captor's sureties, it was accordingly awarded to issue on the 18th of July thereafter: but upon application on behalf of the sureties, praying that such attachment might not be issued till his Majesty's pleasure should be known, the following order was accordingly transmitted to the Registrar of the High Court of Admiralty,

( C O P Y . )

Council-Office, Whitehall,  
20th, July, 1786.

S I R,

IN the absence of the Lord President I have received Lord Sydney's commands to signify to you his Lordship's directions that the attachment decreed by the Lords  
of

of Appeals in Prize Causes on the 18th day of May last, in the case of the ship Nicholas and her cargo, be not issued, until his Majesty's pleasure shall be known on the petition of William Brymer, Esquire, presented to his Majesty in Council, praying a review of the said decree,

I am,

S I R,

Your most obedient humble Servant,

W. FAWKENER.

MAURICE SWABEY, Esq.



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